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No. 2703

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. L. ALVERSON,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Defendant in Error.

PETITION FOR REHEARING.

Upon Writ of Error to the District Court of the United States, Eastern District of Washington, Northern Division

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THE FRANKLIN PRESS, SPOKANE

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The opinion herein refusing to consider the exceptions to the charge of the trial judge because not taken in open court before the jury had retired, omits to refer in any way to Rule 58 promulgated by the Appellate Court for the Ninth Circuit, and adopted as a rule of practice by the trial court, specifically providing for the taking of exceptions

after the jury has retired to consider of its verdict.

This rule is set out in *haec verba* on page 4 of the reply brief, and the omission of the court to discuss or even refer to our contention that the exceptions were taken in accordance with and entitled to be considered under this rule, leads us to fear that through mistake or oversight the reply brief, where this point was necessarily first presented, failed to reach the hands of the court. We feel justified, therefore, in filing this petition for a rehearing, again inviting attention to Rule 58 of the trial court as found in the Revised Rules of the U. S. Circuit Court and U. S. District Court for the District of Washington, p. 49.

Said rule is as follows:

> "Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter

(if one is in attendance) so to note the same."

As shown in our reply brief, the above rule was promulgated as a rule of practice in this jurisdiction in 1904 by the three judges of the Circuit Court of Appeals, and was thereafter adopted as a rule of practice in the District Court of Washington in the following language found on p. 81 of the printed rules now in use in this district as follows:

> "The Rules of the Circuit Court in and for the District of Washington, shall be the rules of practice governing the transaction of business in this Court; the admission of attorneys to practice; the conduct of the officers of the Court; the proceedings in actions at law, suits in equity and criminal prosecutions, and all other matters not otherwise provided for."

Numerous authorities are also cited in the reply brief from this and other Appellate and Federal Courts to the effect that rules of court regularly promulgated and adopted have and are to be given the force and effect of law. Attention is also there called to the fact that the practice of requiring exceptions to be taken while the jury is at the bar is not in pursuance of any Federal Statute or rule of the Supreme Court, but has simply become recognized and been followed in this country in pursuance of the Statute of Westminster 2, which, of

course, is not controlling except in so far as the courts of this country may see fit to follow it when not in actual conflict with their own established rules of procedure.

We respectfully suggest that the lawyers of the State of Washington, practicing in the Federal Courts where Rule 58 above quoted is still outstanding as one of the rules of practice in the Federal Courts of said State and District, are entitled to have this question squarely settled by distinct reference to the rule in question in order that if said rule is not to be followed or considered as controlling they may be so advised by definite statement of this Appellate Court, referring specifically to and announcing that it is not of any valid force or effect.

We, therefore, believe that this court will recognize the propriety of our request for a re-consideration of the case on this one point and justify us in the presentation of this petition for a re-hearing.

Respectfully submitted,

PLUMMER & LAVIN, *and*
O. C. MOORE,
Attorneys for Plaintiff in Error.

STATE OF WASHINGTON, }
County of Spokane, } ss.

We, W. H. Plummer, Joseph Lavin and O. C. Moore, separately hereby certify: That I am of counsel for the plaintiff in error, and in my judgment the above and foregoing petition for a rehearing is well founded in law, and that it is not interposed for the purpose of delay.

W. H. PLUMMER.
JOSEPH LAVIN,
O. C. MOORE.